IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2104 of 2006
With
SPECIAL CIVIL APPLICATION No. 2107 of 2006
With
SPECIAL CIVIL APPLICATION No. 2109 of 2006

For Approval and Signature:

HONOURABLE MS. JUSTICE R.M.DOSHIT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHISHMA N.THAKORE - Petitioner(s)
Versus
DENA BANK THROUGH AUTHORISED OFFICER - Respondent(s)

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Appearance :
MR MIHIR JOSHI, SR.ADVOCATE with MR DHARMESH SHAH for the Petitioner
MR SS PANESAR for the Respondent

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CORAM : HONOURABLE MS. JUSTICE R.M.DOSHIT

Date : 29/04/2006 – 01/05/2006

COMMON ORAL JUDGMENT

These three petitions under Article 226 of the Constitution of India have been preferred by the guarantors against the action of the respondent Dena Bank

(hereinafter referred to as, **"the Bank"**) in issuing notice for remittance of its dues under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as, **"the Act of 2002"**).

It is not in dispute that the Bank had advanced financial assistance to one Norris Medicines Limited (hereinafter referred to as, **"the Company"**) to the extent of Rs.365 lakhs which was later enhanced to Rs.720 lakhs. The petitioners herein gave guarantee and offered the property in question in mortgage as collateral security. It is also not in dispute that the Company failed to discharge its liability to the Bank. The Bank has, therefore, approached the Debt Recovery Tribunal (hereinafter referred to as, **"the Tribunal"**) under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as, **"the Act of 1993"**). The Bank has filed Original Application No.199/2001 for recovery of a sum of Rs.6,67,51,922=00 from the Company and nine others including the present petitioners. Pending the said proceeding, after introduction of the Act of 2002, the Bank has initiated proceeding for recovery of its dues as envisaged by the Act of 2002. On 7th December, 2005 the Bank has issued

notice for remittance of its dues within sixty days as envisaged by Section 13(2) of the Act of 2002. Feeling aggrieved, the petitioners have preferred the present petitions.

The challenge is three-fold. Mr.Joshi has submitted that the Company has moved reference before the Board for Industrial and Financial Reconstruction (hereinafter referred to as, "**the BIFR**") as envisaged by Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as, "**the Act of 1985**"). The BIFR has been seized of the matter and is inquiring into the working of the Company. Pending the said inquiry, no recovery proceeding shall be maintainable against the Company as envisaged by Section 22 of the Act of 1985. He has submitted that the action taken by the Bank pending the inquiry by the BIFR is barred by law and requires to be quashed and set-aside. He has next submitted that against the impugned notice dated 7th December, 2005 the petitioners have lodged objections on 4th February, 2006. It is the statutory duty of the Bank to consider and decide the said objections and to communicate its decision to the petitioners. Unless the Bank discharges the said statutory obligation, the Bank has no authority to proceed further with the recovery proceeding as

envisaged by Section 13(4) of the Act of 2002. In support thereof, he has relied upon sub-section (3A) of Section 13 of the Act of 2002. He has also submitted that the Bank, having instituted Original Application No.199/2001 before the Tribunal for recovery of its dues, the Bank has no authority to proceed under the Act of 2002 as well. In support of this argument, he has relied upon the judgment of the Punjab and Haryana High Court in the matter of **Kalyani Sales Company and another v/s. Union of India and another** [I (2006) BC 1].

Mr.Panesar has appeared for the Bank and has contested the petitions. He has submitted that sub-section (3A) of Section 13 of the Act of 2002 confers discretion on the Bank whether or not to withdraw application pending before the Tribunal. He has submitted that there is no bar against the Bank's taking out proceeding under the Act of 2002 pending the proceeding before the Tribunal. He has relied upon the judgment of the Hon'ble Supreme Court in the matter of **Kailash Nath Agarwal and others v/s. Pradeshiya Indust. & Inv. Corp. of U.P. and another** [AIR 2003 SC 1886]. He has submitted that the protection against the coercive recovery conferred by Section 22 of the Act of 1985 is confined to the borrowers. Such protection is not extended to the

guarantors. The present petitioners being guarantors cannot claim right to protection under Section 22 of the Act of 1985. He has further submitted that moment the Bank initiates recovery proceedings under the Act of 2002, the reference pending before the BIFR stands abated. In the present case also, upon the Bank's exercising its right to recover its dues by sale of the secured assets conferred by the Act of 2002, the reference pending before the BIFR shall stand abated. Therefore also, the petitioners have no right to claim protection conferred by Section 22 of the Act of 1985. He has further assured that the Bank, unless it discharges its obligation under sub-section (3A) of Section 13 of the Act of 2002, shall not proceed in furtherance of the impugned notice dated 7th December, 2005. The impugned notice issued under Section 13(2) of the Act of 2002 cannot be vitiated on that ground. He has also submitted that the present petitions are premature as no coercive recovery has been made from the petitioners. In the event any action is taken under Section 13(4) of the Act of 2002, the petitioners shall have alternative efficacious remedy of statutory appeal before the Tribunal. Therefore also, the present petitions require to be dismissed in limine.

01/05/2006

It is not in dispute that the borrower Norris Medicines Limited has made a reference to the BIFR under the Act of 1985. Section 22 of the Act of 1985 provides for suspension of legal proceedings, contracts, etc. pending any inquiry or preparation of a scheme or during implementation of the sanctioned scheme in respect of an industrial company. Thus, the protection conferred against the execution, distress or the like by Section 22 of the Act of 1985 is confined to the properties of the Sick Industrial Companies alone. Such protection has not been extended to the guarantors or in respect of the properties offered by the guarantors as collateral security. That is the view expressed by the Hon'ble Supreme Court in the matter of Kailash Nath Agarwal and others (supra). The petitioner's claim for protection under Section 22 of the Act of 1985 is, therefore, not maintainable. Further by Section 41 of the Act of 2002, Section 15 of the Act of 1985 has been amended. By the said amendment a proviso has been added to sub-section (1) of Section 15 of the Act of 1985 which reads as under:

> **“Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the**

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where financial assets have been acquired by any securitisation company or reconstruction company under sub-section (1) of section 5 of that Act:

Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of section 13 of that Act."

In view of the above proviso, on the Bank's taking any measure to recover the secured debt under the Act of 2002, the proceeding pending before the BIFR shall stand abated. Reference made to the BIFR thereafter shall not give further protection to the borrower much less to the guarantors, the present petitioners.

Next is the question whether the Bank was obliged to withdraw the proceeding pending before the Tribunal before it elected to invoke its right under the Act of 2002.

To examine this issue, one has to refer to Section 19 of the Act of 1993. Section 19 of the Act of 1993 provides, inter alia, for application to the Tribunal. It empowers a bank or a financial institution, which has to recover any debt from any person, to make an application to the Tribunal. The first proviso to sub-section (1) of the said Section 19 enables a bank or a financial institution to seek permission of the Tribunal to withdraw the application for the purpose of taking action under the Act of 2002. The said Section 19(1) and the proviso thereof read as under :

> **“Application to the Tribunal.--(1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction--**
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> **(a) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides or**

carries on business or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or

(c) the cause of action, wholly or in part, arises:

Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it, withdraw the application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 for the purpose of taking action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), if no such action had been taken earlier under that Act:"

The contention is that though the proviso says that the bank or the financial institution "may" seek permission to withdraw the application. The said proviso is mandatory in nature i.e. in case the bank or the financial institution intends to enforce the security interest as envisaged by the Act of 2002, it is imperative for such bank or financial institution to first withdraw the application pending before the

Tribunal. In other words, the bank or the financial institution is required to choose to proceed against the debtor either by making application to the Tribunal under the Act of 1985 or to recover its dues from the secured assets as envisaged by the Act of 2002. It is not open to the bank or the financial institution to avail of both the remedies simultaneously. That is the view expressed by the Punjab and Haryana High Court in the matter of Kalyani Sales Company and another (supra). The learned Judges of the said High Court has invoked the principle of doctrine of election of remedy and has held that, **"...The doctrine of election is a rule of estoppel. It is an obligation imposed upon a party by the Court of equity to choose between two inconsistent or alternative rights or claims.**" The Hon'ble Judges have, in paragraph 38 of the judgment, held that, "**...The first proviso to Section 19 gives statutory recognition to the doctrine of election which contemplates that one remedy can be taken in respect of one action. Such intention can be gathered from Para 6 of the Statement of Objects and Reasons as well as from the provisions of Sub-section (10) of Section 13 of the Act which contemplates filing of an application for recovery of the shortfall after secured assets in terms of the Act has been realised. The second**

and the third provisos to Section 19 of the RDB Act also contemplate an expeditious decision on an application for withdrawal of the application made under the provisions of Section 19(1) to enable the Bank to have action under the Act. Thus, we hold that though it is discretionary for the Bank to proceed under the Act, but if the Bank or the financial institution chooses to take recourse to the Act, it is mandatory for the Bank or the financial institution as the case may be, to withdraw its application made to the Debts Recovery Tribunal." Consequently, it has been held that, "**...Thus, we conclude that the Bank or financial institution has to elect its remedy to either proceed under the RDB Act or to withdraw such proceedings to enable them to initiate action under the Act**."

The Bombay and the Kerala High Courts, however, have a different view. The Kerala High Court has, in the matter of **Sahir Shah v/s. Bank of India** [2006(1) ISJ (Banking) 263], held that, "...**It is not mandatory on the part of the Bank or Financial Institution to make an application before the Tribunal or to seek permission before invoking the provisions of the Securitisation Act. The power conferred on the Tribunal under the third proviso to S.19(1)(c) is only to refuse or grant**

permission for withdrawal. No power is conferred on the Tribunal under the RDB Act to prevent the Bank or Financial Institution from invoking the provisions of the Securitisation Act. Only power conferred on the Tribunal is to decide as to whether the request for withdrawal of the application pending before the Tribunal could be granted or not."

The Bombay High Court has taken a similar view but in different way. The Bombay High Court has, in the matter of **Wardhaman Shamjibhai Dharamsi and another v/s. Bank of Maharashtra** [2006(1) DRTC 339], held that, **"...Assuming for a moment that the proviso applies, does the proviso lead to the inference that a creditor has to elect to move either under one of the two Acts. As noted earlier, the action under Sec.13 is without intervention of the Courts. Considering Sec.37 read with 35 it is open to a secured creditor to move under the SRFAESI Act and there is no bar. Under the SRFAESI Act the secured creditor will not be moving a Court for relief and no adjudicating process is involved. In so far as RDDBFI Act is concerned, it is a Tribunal on which certain powers under the CPC have been conferred. If the proceedings initiated under Sec.19 had already been initiated then by**

virtue of the proviso as illustrated, liberty is given to the financial institution or the bank to move the D.R.T. To withdraw the application whether made before or after the amendment in the SRFAESI Act, if no such action had been taken earlier. This is only an enabling power. The power is conferred on the Tribunal, whether to grant permission or not to grant permission. At the highest, therefore, all that can be said is that if a creditor had already applied under the provisions of Sec.19 of RDDBFI Act then he cannot withdraw those proceedings except with the leave of the Court. No where does Sec.19 expressly or impliedly bar the remedy of the creditor in moving under the SRFAESI Act. This could not have been done considering the provisions of Secs.35 and 37 of the SRFAESI Act."

The Madras High Court has, in paragraph 28 of the unreported judgment in the matter of **M/s.Digivision Electronics Ltd. v/s. Indian Bank and another** [W.P.No.13056 of 2005 decided on 7th July, 2005], recorded its opinion "**...Hence, in our opinion, if notice under Section 13(2) had been issued prior to 11.11.2004, there is no requirement to take permission from the Debts Recovery Tribunal for withdrawal of an application**

pending before it. It is only where notice under Section 13(2) is sought to be issued subsequent to 11.11.2004 that permission for withdrawal of an application pending before the Debts Recovery Tribunal is necessary; and no action can be taken under the Securitisation Act before grant of such permission by the Tribunal."

What could be the legislative intent ? Does not a right to withdraw the pending proceeding inhere in every litigant ? Is it not inherent that a legal proceeding pending before any court or judicial forum cannot be withdrawn without the express permission of that court or the judicial forum ? If withdrawal of any legal proceeding with the permission of the court is permissible under ordinary law, why should the legislature specifically provide for application for such permission. If the legislative intent were to make it compulsory to withdraw the pending proceeding before the Tribunal, the legislature has not said so in specific terms. In my view, it would be incongruent to say that a pending proceeding be withdrawn with the permission of the Tribunal for the purpose of recovering the dues from the secured assets and to file a further proceeding in case the sale proceeds from the sale of the secured assets do not satisfy the dues in its entirety. Neither

the above proviso (unlike sub-rule (3) of Rule 1 of Order XXIII CPC) nor the sub-section (10) of Section 13 provides for making application afresh after it is once withdrawn as envisaged by the aforesaid proviso.

I am in respectful agreement with the view expressed by the Bombay High Court. The aforesaid proviso to Section 19 has been inserted with effect from 11th November, 2004 by Act 30 of 2004. The proviso does refer to the withdrawal of the application pending before the Tribunal for the purpose of taking action under the Act of 2002. The question, however, is whether it is a mandatory requirement to withdraw the pending application. If this proviso were construed to provide for a mandatory requirement, what would be the consequence thereof. As recorded hereinabove, the word used is “may” and not “shall” as it is usually used to connote a mandatory requirement. Besides, the statute does not provide for consequences either in case of withdrawal of the pending application or in case of non-withdrawal of such application. Further, sub-section (10) of Section 13 of the Act of 2002 provides that, “**...Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner**

as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower." Thus, what is contemplated is that in case the sale proceeds of the secured assets do not fully satisfy the dues of the secured creditors, the secured creditor may make an application to the Tribunal for recovery of the balance amount from the borrower i.e. if the proviso were construed to be mandatory, a bank or financial institution would be required to first withdraw the pending application than to proceed to recover its dues from the secured assets as envisaged by the Act of 2002 and then, in case the sale proceeds are not sufficient to satisfy its dues, to file another application before the Tribunal for recovery of the balance of the amount. Thus, it would lead to multiplicity of the proceedings. That would also raise various other questions like what should happen to an order of attachment if made under sub-section (15) of Section 19 of the Act of 1993. Moment the application is permitted to be withdrawn, such order made pending the application would cease to operate. In that case, would not the borrower in default be given a free reign to fritter away the properties earlier under attachment by the Tribunal. The question of limitation should also arise as Section 24 of the Act of 1993

provides that, **"...The provisions of the Limitation Act, 1963 (36 of 1963), shall, as far as may be, apply to an application made to a Tribunal."** If the Legislature intended the aforesaid proviso to be mandatory, the Legislature would have provided for extension of period of limitation as it has been done in the Act of 1985. Section 22 of the Act of 1985 provides for suspension of the legal proceedings and contracts. In view of the suspension of the proceedings under sub-section (1) of Section 22 of the Act of 1985, the Legislature has extended the period of limitation by a specific provision made in sub-section (5) of the said Section 22 as under :

> **"In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded."**

In the present case, however, though Section 24 of the Act of 1993 provides that the Limitation Act shall apply, the Legislature has not provided for the extension of period of limitation by such period during which the application pending before the Tribunal is withdrawn with the permission of the Tribunal and till the measures taken under the Act of 2002 are completed. In other

words, if the bank or the financial institution elects to recover its dues from the secured assets under the Act of 2002, it may have to forgo its claim over the balance of the dues as by that time the period of limitation may expire. In the alternative the bank or the financial institution, with a view to saving the period of limitation, will have to proceed further before the Tribunal. In that case the statutory remedy available to the bank or the financial institution under the Act of 2002 would be denied. The purpose of the Act of 2002 in such case would be defeated.

In my opinion both views, one expressed by the Punjab and Haryana High Court and the other expressed by the Bombay High Court are possible. But, the principles of interpretation of statute do not permit a Court of law to take a view which would lead to the multiplicity of proceedings. I am, therefore, inclined to hold that the proviso to sub-section (1) of Section 19 of the Act of 1993 which provides for withdrawal of the application pending before the Tribunal is directory and not mandatory. In other words, a bank or a financial institution which has approached the Tribunal either before or after 11th November, 2004, if so chooses, may avail of the remedy under the Act of 2002 without first

withdrawing the application pending before the Tribunal.

This brings me to the last of the challenges i.e. the grievance made by the petitioners against the bank for not considering the objections lodged by the petitioners. In my view the challenge is premature. It is true that sub-section (3A) of Section 13 of the Act of 2002 empowers a borrower to make a representation or raise any objection against the notice issued under sub-section (2) of the said Section 13. The said sub-section also makes it obligatory upon the secured creditors to consider such representations or objections, to decide and to communicate the decision thereof. The said provision is indisputably mandatory. The secured creditor would be debarred from proceeding further unless the representation or the objection received by it is considered, decided and the decision is communicated to the borrower. In the present case, Mr.Panesar has submitted that the objections raised by the petitioners have not been considered in view of the pending petitions. He has further assured that the Bank shall not proceed further until the mandatory requirement under sub-section (3A) of Section 13 of the Act of 2002 is complied with.

In view of the statement made by Mr.Panesar on behalf of the Bank, no order is required to be made on that count.

For the aforesaid reasons, these petitions are dismissed in limine. Notice issued in each petition is discharged. Ad-interim orders stand vacated. The Registry shall maintain copy of this order in each petition.

Registry shall maintain copy of this judgment in each petition.

(Ms. R.M.Doshit, J.)

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